

RECEIVED
BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

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TO THE HONORABLE TERRY R. MEANS, UNITED STATES DISTRICT JUDGE:

On August 22, 2003, Michael Dennis Lloyd and Judy Ann Lloyd (“Plaintiffs”) filed Plaintiffs’ Second Amended Complaint. The Jury Demand by Defendants Jenkins & Gilchrist, P.C., Jeffrey A. Walsh, and James A. Barrow (“Defendants Jenkins”) was filed on September 2, 2003. The Motion to Withdraw Reference by Defendants Jenkins (the “Motion”) was filed on September 16, 2003. No response to the Motion was filed.¹ A status conference and hearing (“hearing”) on the Motion was held in this bankruptcy court on February 3, 2005. Third-Party Defendant John C. Boucher (“Mr. Boucher”) failed to appear.² All remaining parties appeared through counsel.

At the hearing, all parties agreed that Defendants Jenkins are entitled to a jury trial on Plaintiffs’ sole remaining issue – money damages for alleged wrongful foreclosure on property. Defendants Jenkins, however, did not give express consent for this bankruptcy judge to conduct the jury trial. Additionally, Defendants David L. Lewis and Shawn Lewis (“Defendants Lewis”) argued that it was premature for this bankruptcy court to consider the Motion because there is a parallel lawsuit filed by Defendants Lewis pending in state court in Bexar County which alleges that the attorneys who represented Defendants Lewis in connection with the foreclosure did not handle the foreclosure properly. Defendants Lewis argued that this bankruptcy court should carry the Motion until the Bexar County jury trial currently set for September or October 2005 is

¹ Shortly after the Motion was filed, the parties initiated attempts to resolve this matter through mediation and requested repeated continuances of proceedings regarding the Motion. Accordingly, the above Court’s Order Administratively Closing Case “pending the parties’ attempts to mediate their dispute” was filed in Action No. 4:03-CV-1172-Y on November 26, 2003. Ultimately, mediation proved unsuccessful.

² The record indicates that Mr. Boucher is acting *pro se* in this matter and that he received notice of the hearing on the Motion.

resolved. Plaintiffs agreed with Defendants Lewis that the parallel state court litigation would generally involve the same discovery, and Third-Party Defendant Glasgow agreed with Plaintiffs' position. Finally, Defendants Jenkins and Plaintiffs urged this bankruptcy court to recommend that it retain jurisdiction over pretrial matters in this adversary case even if the matter is ultimately set for trial in the above Court.

For the reasons set forth below, the bankruptcy court agrees that Defendants Jenkins are entitled to a jury trial in the above Court and respectfully recommends that the Motion be granted.

Withdrawal of the Reference

The bankruptcy court presumes from Defendants Jenkins' arguments made at the hearing that Defendants Jenkins seek withdrawal of the reference pursuant to 28 U.S.C. § 157(e)³ which provides, in relevant part, as follows:

- (e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C. § 157(e) (2005).

Defendants Jenkins bear the burden of showing cause sufficient to justify withdrawal of the reference. *NDEP Corp. v. Handl-It, Inc. (In re NDEP Corp.)*, 203 B.R. 905, 907 (D. Del. 1996). Cause may exist where the movant's right to a jury trial dictates that the reference be withdrawn. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 47-48 (1989).

³ Defendants Jenkins' Motion cites § 158(d).

A party against whom legal action has been brought to recover monetary damages and who has never filed a claim against the estate is entitled to a jury trial under the constitutional mandates of the Seventh Amendment to the United States Constitution, notwithstanding Congress' characterization of the action as a core proceeding. *Id.* at 36, 57-58.

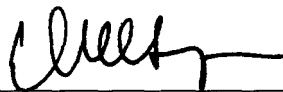
The United States Supreme Court made clear that “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.” *Id.* at 57. The Court “did not intend to cast doubt on the proposition” that actions which seek solely legal relief by parties who have not entered a claim against the estate neither arise “as part of the process of allowance and disallowance of claims” nor are “integral to the restructuring of debtor-creditor relations.” *Id.* at 58. In those instances, the Court determined that the right to a jury trial had been preserved. *Id.* Although the Supreme Court acknowledged that, under certain circumstances, allowing jury trials could “impede the swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations,” the Court nevertheless concluded that “these considerations are insufficient to overcome the clear command of the Seventh Amendment.” *Id.* at 63.

Here, the bankruptcy court is persuaded that Defendants Jenkins have shown cause sufficient to justify withdrawal of the reference. The record before the court indicates, and the parties do not dispute, that (1) Defendants Jenkins have not filed a claim against the estate; (2) Defendants Jenkins timely demanded a jury trial; (3) Defendants Jenkins have not expressly consented to this bankruptcy court's conduct of the jury trial; and (4) Plaintiffs' state law cause

of action for alleged wrongful foreclosure is a legal claim seeking monetary damages for which Defendants Jenkins would otherwise be entitled to a jury trial absent the bankruptcy proceedings. *See Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985) (enumerating factors to be considered when cause for withdrawal of reference must be determined, including, *inter alia*, whether a jury trial has been requested); *Goldstein v. K-Swiss, Inc. (In re Just for Feet, Inc.)*, 2002 Bankr. LEXIS 330, at *5 (D. Del. Apr. 9, 2002) (agreeing that the right to a jury trial constitutes sufficient cause for withdrawal of the reference); *In re Clay*, 35 F.3d at 196 (finding that “[c]onsent is a key factor empowering [non-Article III judges] to conduct jury proceedings”); *Landry v. Exxon Pipeline Co. Mendoza Marine, Inc.*, 260 B. R. 769, 805 n.117 (M.D. La. 2001) (concluding that lack of consent of all parties to bankruptcy court’s conduct of jury trial can be cured by withdrawal of the reference).

Accordingly, the court concludes that Defendants Jenkins are entitled to a jury trial in the above Court and respectfully recommends that the Motion be granted and the reference be withdrawn. This bankruptcy court also respectfully offers its assistance to the above Court regarding preliminary trial matters in this adversary case should the above Court wish such assistance.

RESPECTFULLY SUBMITTED,



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

Dated: 4/4/05